

No. 96-1581

16

SUPREME COURT U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,  
v. *Petitioner,*

YANKTON SIOUX TRIBE, a federally recognized  
tribe of Indians, and its individual members;  
DARRELL E. DRAPEAU, individually, a member  
of the Yankton Sioux Tribe,  
and *Respondents,*

SOUTHERN MISSOURI WASTE MANAGEMENT  
DISTRICT, a nonprofit corporation,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

BRIEF OF DUCHESNE COUNTY, UTAH  
AND UINTAH COUNTY, UTAH,  
*AMICI CURIAE*, IN SUPPORT OF  
PETITIONER, STATE OF SOUTH DAKOTA

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39 pp

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. THE POST-HAGEN ARGUMENT OF THE UNITED STATES IS WITHOUT MERIT.....	3
A. Preliminary Correction of Serious Misstatement by the United States .....	3
B. Preliminary Observations Regarding the Submissions and the Decisions in <i>Seymour</i> , <i>Mattz</i> , <i>DeCoteau</i> , <i>Rosebud</i> , <i>Solem</i> , and <i>Hagen</i> .....	
C. Chronological Response to the Post-Hagen Argument Submitted by the United States....	5
D. This Court's Opinion in <i>Hagen</i> Does Not Support the Post-Hagen Argument of the United States .....	24
E. The United States has Abandoned the Classic "Checkerboard Jurisdiction" Argument.....	29
CONCLUSION .....	30

## TABLE OF AUTHORITIES

CASES:	Page
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975) .....	<i>passim</i>
<i>Hagen v. Utah</i> , 510 U.S. 399 (1994) .....	<i>passim</i>
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973) .....	2
<i>Pittsburg &amp; Midway Coal Mining Co. v. Yazzie</i> , 909 F.2d 1387 (10th Cir. 1990), <i>cert. denied</i> , 498 U.S. 1012 (1990) .....	5, 26, 28, 30
<i>Rosebud Sioux Tribe v. Kneip</i> , 430 U.S. 584 (1977) .....	<i>passim</i>
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962) .....	2, 24, 29
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984) .....	2, 4, 21
<i>State v. Hagen</i> , 858 P.2d 925 (Utah 1992) .....	5
<i>State v. Perank</i> , 858 P.2d 927 (Utah 1992) .....	5, 13, 14, 18
<i>United States v. Cuch</i> , 79 F.3d 987 (10th Cir. 1996) <i>cert. denied</i> , 117 S.Ct. 384 (1996) .....	5
<i>United States v. Duncan</i> , 857 F.Supp. 852 (D. Utah 1994) .....	5
<i>Ute Indian Tribe v. Utah</i> , 773 F.2d 1087 (10th Cir. 1985) <i>cert. denied</i> , 479 U.S. 994 (1986) .....	5, 14, 26, 29
<i>Ute Indian Tribe v. Utah</i> , 935 F.Supp. 1473 (D. Utah 1996) .....	1, 6
<i>Ute Indian Tribe v. Utah</i> , 114 F.3d 1513 (10th Cir. 1997) <i>reh'g denied</i> (July 1, 1997) .....	2, 6
STATUTES:	
Act of May 27, 1902, ch. 888, 32 Stat. 245 .....	14
Act of March 3, 1905, ch. 1479, 33 Stat. 1048 .....	14
18 U.S.C. § 1151(c) .....	1, 28
OTHER AUTHORITIES:	
Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903 .....	8, 25
Brief of the United States, <i>Ute Indian Tribe v. Utah</i> , 773 F.2d 1087 (10th Cir. 1985) ( <i>en banc</i> ) (No. 81-1827, 81-1901) .....	29

## TABLE OF AUTHORITIES—Continued

	Page
Memorandum in Support of Renewed Motion for Injunctive Relief, <i>Ute Indian Tribe v. Utah</i> (D. Utah July 31, 1992) (No. C-75-408-J) .....	11
Tribe's Brief in Support of Permanent Injunction, <i>Ute Indian Tribe v. Utah</i> (D. Utah Sept. 24, 1992) (No. C-75-408-J) .....	
Tribe's Reply Brief in Support of Permanent Injunction, <i>Ute Indian Tribe v. Utah</i> (D. Utah Dec. 10, 1992) (No. C-75-408-J) .....	12
United States' Memorandum as <i>Amicus Curiae</i> in Support of Ute Indian Tribe's Motion for Injunctive Relief, <i>Ute Indian Tribe v. Utah</i> (D. Utah Nov. 23, 1992) (No. C-75-408-J) .....	13
Brief of Petitioner, <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	4, 20
Brief for the United States as <i>Amicus Curiae</i> , <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	14, 18
Brief of <i>Amicus Curiae</i> Ute Indian Tribe in Support of Petition for Rehearing, <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	3, 16, 27
Motion of Ute Indian Tribe to Intervene as a Matter of Right, <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	7, 14
Brief of <i>Amicus Curiae</i> Ute Indian Tribe in Opposition to Granting the Writ of Certiorari, <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	13
Transcript of Oral Argument, <i>Hagen v. Utah</i> , 510 U.S. 399 (1994) (No. 92-6281) .....	10, 19, 22
Brief for the United States as <i>Amicus Curiae</i> in Support of Plaintiffs-Appellees, <i>Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.</i> , 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) .....	2, 3

### INTEREST OF AMICI CURIAE

Duchesne County, Utah, and Uintah County, Utah, as *Amici Curiae* in Support of the State of South Dakota, file this brief with the Court for a limited purpose. The Counties want to specifically direct the Court's attention to an argument submitted below by the United States that is premised on an overly restrictive view of the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994). According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status *only* those lands ceded, restored to the public domain, or otherwise directly affected, leaving reservation boundaries *intact* so as to encompass all other fee lands in the same area. The argument ignores the fact that when trust title to an allotment is extinguished and passes into fee status, it would otherwise cease to be Indian country. 18 U.S.C. § 1151(c). *DeCoteau*, 420 U.S. 425, 427 n.2, 446-447. It also ignores special acts and other federal orders directed to fee lands, inconsistent with continuing reservation status. As a result, *title searches* would be required to determine jurisdiction, rather than the routine fee/trust checkerboard identifications of the past. A title search requirement of this nature would be unprecedented and completely unworkable. Neither *Hagen* nor any other decision of this Court supports this claim. The Counties think that the State of South Dakota will prevail on the merits in this case. As a result, this post-*Hagen* argument will be implicated and it deserves additional attention.

Duchesne County, Utah, and Uintah County, Utah are in a favorable position to offer views in response to this argument of the United States for two reasons. First, as *amici curiae* participants in *Hagen* and *Hagen*-related litigation for almost two decades, the Counties are as familiar as the United States with the submissions and the record in *Hagen* and similar cases. Secondly, the United States initially submitted this argument in the Tenth Circuit, as *amicus curiae*, in post-*Hagen* proceedings in which the Counties are parties. *See Ute Indian Tribe v. Utah*,

935 F.Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *reh'g denied*, (July 1, 1997), where this argument recently received favorable consideration, after 40 months of needless post-*Hagen* litigation, which is not over yet.

As a result, the argument is of more than just passing concern in Duchesne County, Utah, and Uintah County, Utah (and in every county similarly situated). In due course, Duchesne County and Uintah County intend to seek relief from the Tenth Circuit litigation by filing a petition for a writ of certiorari in this Court, which will also further address this argument and other related points. In the meantime, the Counties thought the argument should be brought directly to the attention of this Court.

#### SUMMARY OF ARGUMENT

The post-*Hagen* argument of the United States is based only on isolated sentences in the *Hagen* opinion, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. This argument is pure sophistry, and it flies in the face of the submissions and decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Maitz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994).

In addition, the United States concedes that after the post-*Hagen* argument is recognized, implementation will require title searches, instead of the routine fee/trust checkerboard identifications that have been in place for decades in these areas and in areas similarly situated. Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (96-1581). In a Petition for Rehearing in this Court in *Hagen*, even the Ute Indian Tribe acknowledged that this scenario promised nightmarish consequences and would

be completely unworkable. Br. of *Amicus Curiae* Ute Indian Tribe in Supp. of the Pet. for Reh'g, *Hagen v. Utah*, 510 U.S. 399 (1994) (92-6281). *Hagen* does not support this argument. No decision of this Court supports this argument. The decision of this Court in this case should make that point unmistakably clear.

#### ARGUMENT

##### I. THE POST-HAGEN ARGUMENT OF THE UNITED STATES IS WITHOUT MERIT.

###### A. Preliminary Correction of Serious Misstatement by the United States.

In this case, the United States first introduced a version of this argument in the court of appeals by way of a footnote in the Brief for United States at 17 n.6, *Yankton Sioux Tribe*, (No. 95-2647). The United States did not participate in the district court. The entire argument is set forth as follows:

"Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unallotted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, see

*Solem*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

*Id.* at 17 n.6.

At the outset, a critical misstatement by the United States with respect to the "State's argument" must be addressed. In this footnote, the United States clearly suggests that the "State's argument" would yield an "anomalous result" and the "State's argument" should be rejected for that reason. *Id.* The State of South Dakota has never made the argument the United States suggests and neither has any other State. To the contrary, the States have always maintained that only trust land remains Indian country after the diminishment or disestablishment of a reservation area. *See generally* Pet. Br. at 3 n.2. The balance of the footnote is simply the result of the post-*Hagen* argument of the United States. Apart from the fact that the post-*Hagen* argument lacks merit as discussed below, the tact adopted by the United States in this instance to support its position is not acceptable. The Counties respectfully submit that it should not be repeated in the briefs to this Court. If the United States chooses to make an argument, that argument can be made, but the State's argument (or anyone else's) should not be misstated as a part of the process.

**B. Preliminary Observations Regarding the Submissions and the Decisions in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, *Solem*, and *Hagen*.**

One overall observation should be kept in mind in assessing the merits of the post-*Hagen* argument of the United States. The submission and the decisions in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, *Solem*, and *Hagen* are all premised on a trust land/fee land jurisdictional distinction that would be the result in a diminished or disestablished portion of a reservation area. The briefs and oral arguments in each of the cases support this conclusion. And the decision in each of the cases confirms

that understanding. But for the Tenth Circuit's *unprecedented* decision accepting the post-*Hagen* position of the United States in spite of all of this, the argument would hardly seem to have merited any more than a summary response. In that light, however, the position deserves the more detailed analysis that follows.

**C. Chronological Response to the Post-*Hagen* Argument Submitted by the United States.**

An appropriate response to the post-*Hagen* argument of the United States should begin by addressing, in sequence, the argument as it was presented. In this instance, we therefore begin with the Utah submissions subsequent to the decision of this Court in *Hagen*.

1. Introduction. Over four years ago, this Court granted certiorari to resolve a direct conflict between decisions of the Tenth Circuit Court of Appeals and the Supreme Court of Utah. In *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), the Tenth Circuit concluded, in a divided *en banc* opinion, that the original boundaries of the Uintah Indian reservation had not been diminished. In *State v. Hagen*, 858 P.2d 925 (Utah 1992) and *State v. Perank*, 858 P.2d 927 (Utah 1992), however, the Supreme Court of the State of Utah reached the opposite conclusion.

In *Hagen*, this Court considered those competing arguments and concluded that the Uintah reservation had in fact been diminished. Panels of the Tenth Circuit subsequently recognized, in passing, the extent to which *Hagen* undermined the holding and rationale of *Ute Indian Tribe*. *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 384 (1996). *See also United States v. Duncan*, 857 F.Supp. 852 (D. Utah 1994). (And even before *Hagen*, the panel in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) noted some fundamental problems with *Ute Indian Tribe*, as this Court subsequently recognized). *Hagen*, 510 U.S. at 414.

But in Utah, by following the lead of the United States, as *amicus curiae*, the district court once again missed its usual way on this exact same question—this time adopting the post-*Hagen* argument. Unfortunately, the court of appeals also adopted the views of the district court (just like the *en banc* majority mistakenly did in *Ute Indian Tribe*). As a result, in the final analysis the Tenth Circuit Court of Appeals incredibly acknowledged that an unprecedented “title search” will be necessary to effectuate the allocation of jurisdiction throughout the hundreds of thousands of acres of the original Uintah reservation. *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *reh’g denied, unpublished order* (June 1, 1997). *Even the Ute Indian Tribe had previously admitted before to this Court that this “title search” approach promises an absolutely unmanageable nightmare. Moreover, it would be a nightmare never before carried out anywhere in the United States.*

The legal issues were relatively straightforward with respect to the post-*Hagen* argument. Nevertheless, for over 25 months, the district court in Utah, at the urging of the United States, resisted the mandate of this Court, and then issued a ninety-six page Memorandum Opinion that wholly obscures an otherwise fairly simple question. *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473 (D. Utah 1996). In *Hagen*, this Court squarely rejected the previous views of the United States and the same district court specifically with respect to the status of the original Uintah reservation. Now, the United States and the same district court have somehow convinced a panel of the Tenth Circuit that, in the process, this Court granted certiorari only to fashion a very limited opinion in *Hagen*, but that *Hagen* also created a jurisdictional nightmare in practical terms. This is clearly not the case.

According to this novel argument, this Court intended *Hagen* to *undermine* the most basic premise of all previous disestablishment/diminishment decisions: namely, that

surplus land statutes either disestablished original reservation boundaries and left remaining trust land as Indian country/reservation, or they did not.

Yet, it was because of a recognition of this fundamental premise that the Ute Indian Tribe told this Court in *Hagen*:

[T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. . . . [I]f this Court were to alter the boundaries of the Reservation. Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation.

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 4-5, 7, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added) (footnote omitted).

The United States told this Court the same thing.

Later, the United States and the Ute Tribe adopted a novel position which instead assumes that in addition to the trust land, a substantial amount of non-Indian fee land is still within original reservation boundaries which this Court in *Hagen* intended to leave intact. The post-*Hagen* argument is completely untenable. It is contrary to what the Ute Indian Tribe and the United States repeatedly told this Court. *And not a single case can be cited in support of this proposition.*

To argue that this Court would adopt such a radical departure in its disestablishment/diminishment precedent, without even mentioning that fact in the text of the *Hagen* opinion, is pure sophistry. This analysis also expressly conflicts with other precedent the Court repeatedly cited throughout the *Hagen* opinion. Apparently, the Tenth

Circuit panel failed to clearly see what the district court was actually suggesting and in so doing lost sight of the real issue.

As a result, *the decision in the Utah case is the first case in the history of this type of litigation to leave substantial non-Indian fee lands within original reservation boundaries after an area had been restored to the public domain*—in other words, after the area has been the subject of this type of a disestablishment surplus land statute.

If the Court of Appeals in the Tenth Circuit had addressed, or at least noted, that portion of the *Hagen* opinion that set forth Inspector McLaughlin's "picturesque phrase" with special emphasis, it could not have recognized any such reservation boundary:

Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . "You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*" . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

*Hagen*, 510 U.S. at 416, 417 (1994) (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903).

This Court in *Hagen* set forth this quote in the text of the *Hagen* Opinion in support of its "conclusion," including the *bracketed language* and the *added emphasis*. With "no outside boundary line to this reservation," all related

precedent in this Court dictated that the diminished reservation "boundary" would coincide with the trust lands in the area, as the United States and the Ute Indian Tribe recognized and told this Court at the time, as noted above. *Id.* Fee lands could not possibly still be within Indian country/reservation, as the Tenth Circuit court of appeals panel erroneously concluded.

Inspector McLaughlin's "picturesque phrase" ("pull up the nails . . . outside boundary") also establishes the proper historical perspective from which the new arguments of the United States and the Ute Indian Tribe should have been viewed. This Court's bracketed language and added emphasis underscore the significance of the point and undermine the novel proposition: namely, that the historic boundaries of the Uintah Valley reservation continue to exist, even after a restoration of the area to the public domain, in such a manner as to encompass these other fee lands (predominately owned by non-Indians) as well as the National Forest.

As a result, despite the clear language of *Hagen* evincing a termination of the historic reservation boundaries, the panel in the Tenth Circuit did not enter a judgment consistent with the decision in *Hagen*. Instead, the panel accepted the novel argument which *preserves* the historic boundaries of the Uintah reservation. Significantly, this unique argument not only contradicts nearly a century of disestablishment/diminishment case law, as noted above, it also contradicts prior submissions by both the United States and the Ute Tribe *throughout* the *Ute* litigation.

The Ute Tribe and the United States led the Tenth Circuit Court of Appeals to believe that the disestablishment of the original reservation boundaries had not been at issue throughout the *Ute* litigation. As we established, however, prior submissions of both parties vitiate such a contention. *See supra* pp. 2, 8, 9. Indeed, the language employed by both parties makes clear that they were well aware that the real issue never changed: Whether the

original reservation boundaries were disestablished—trust lands versus original reservation boundaries.

Consistent with this position, Utah Attorney General Jan Graham referred to a Map exhibit coded to trust land and boundaries and explained to this Court in oral argument:

MS. GRAHAM: [T]he undisputed reservation, which is 1.2 million acres. . . . [I]n the undisputed reservation, in the *trust* lands, on the tribal lands at Fort Duchesne. . . . [T]here is a reservation there, a big one, 1.2 million acres . . . because of course the reservation, the *trust* lands that are there now are unchallenged by the State and, of course, always have been. . . .

Tr. of Oral Argument at 37, 38, 45, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added).

The Counties submit that this was the “diminished” reservation referred to by *Hagen*.

On the other hand, the United States has parlayed casual references by this Court and the parties to a “diminished” reservation, intended only to summarily describe this trust land, into an argument that assumes continuing historic reservation “boundaries” that encompass all non-Indian fee lands, except those actually homesteaded. The attention of this Court is warranted here to address this important and far reaching misreading of the decision of the Court in *Hagen*.

The public domain restoration language of the Act which opened the reservation for settlement was directed to “all unallotted lands.” As such, it was not intended to simply remove only those lands from reservation status. Instead, this restoration extinguished the historic reservation boundaries.

2. Specific Descriptions in the *Hagen* Submissions Clarify the Trust/Fee Jurisdictional Distinction and Undermine the Post-*Hagen* Argument of the United States.

(a) Descriptions Employed by the United States and the Ute Indian Tribe in *Hagen*.

Immediately after *Perank/Hagen* was decided by the Utah Supreme Court, the Ute Tribe repeatedly told the United States District Court in Utah exactly what was at issue: the disestablishment of the original reservation boundaries, leaving only trust land as Indian Country. It is true that after *Hagen* was decided in this Court, they changed their argument, but what they said before *Hagen* is telling. On July 31, 1992, the Ute Indian Tribe submitted:

The State Supreme Court’s decision, . . . holds that the Uintah Valley Reservation was *disestablished*, except for those lands which are held in *trust* by the United States for the benefit of the Tribe.

Mem. in Supp. of Renewed Mot. for Injunctive Relief at 8, *Ute Indian Tribe v. Utah* (D. Utah July 31, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).

– The State court’s judgment reduces, by almost *three* million acres, the criminal jurisdictional boundaries of the United States and Tribe.

*Id.* at 9 (footnote omitted) (emphasis added).<sup>1</sup>

The State law would subject tribal members who commit offenses off *trust* land to state criminal prosecution.

*Id.* at 10 (emphasis added).

Two months later, in September, 1992,

[T]he State Supreme Court ruled that the Reservation was *disestablished*, except for those lands held in *trust* for an individual Indian or the Tribe.

<sup>1</sup> The Ute Tribe assumed the legal conclusion in *Perank*, if affirmed, would also undermine the continuing existence of the original Uncompahgre reservation. This point and the fact that the United States conceded that the Uncompahgre reservation no longer exists, is briefly discussed *infra*.

Tribe's Br. in Supp. of Permanent Inj. at 8, *Ute Indian Tribe v. Utah* (D.Utah Sept. 24, 1992) (No. C-75-408-J) (emphasis added).

If permitted to be entered as a final judgment, *State v. Perank* would reduce the boundaries of the Uintah and Ouray Reservation, and, thus, the jurisdictional territory of the Tribe, under State law, to approximately 1.1 million acres of trust land.

*Id.* at 3 (footnote omitted) (emphasis added).

The question common to both actions was whether Congress intended to *disestablish* the Reservation.

*Id.* at 12 (emphasis added).

And then, in December, 1992, the Ute Tribe reiterated the same points in no uncertain terms:

[T]he trial court had concluded that Clint Perank was an Indian and that Myton, Utah (*as well as all non-trust lands*) were *outside* the boundaries of the Reservation. . . .

Tribe's Reply Br. in Supp. of Permanent Inj. at 9, *Ute Indian Tribe v. Utah* (D.Utah Dec. 10, 1992) (No. C-75-408-J) (emphasis added).

[T]he *same* arguments in support of its position that the Reservation had been *disestablished* as it advanced. . . .

*Id.* at 17 (emphasis added).

[S]eized upon the opportunity to challenge the Tenth Circuit's decision that, with two exceptions not relevant to these proceedings, the Reservation had not been *disestablished*.

*Id.* at 18 (emphasis added).

The views of the United States were submitted to the district court at approximately the same time. In November, 1992, the United States unequivocally addressed this issue in similar terms:

On July 17, 1992, the Supreme Court of Utah held in *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), and two companion cases that the *exterior boundaries* of the Uintah and Ouray Indian Reservation (hereinafter "Reservation") have been *disestablished*. The state court ruling directly conflicts . . .

United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 2, *Ute Indian Tribe v. Utah* (D.Utah Nov. 23, 1992) (No. C-75-408-J) (emphasis added) (footnote omitted).

Nor did the Ute Indian Tribe or the United States confine their views confirming the scope of the issue decided by the Utah Supreme Court to submissions in federal district court. The Ute Indian Tribe told this Court the same thing for other reasons in opposing certiorari in *Hagen* in November, 1992:

[T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of *Amicus Curiae* Ute Indian Tribe in Opp'n to Granting the Writ of *Certiorari* at i, *Hagen*, 510 U.S. 399 (emphasis added).

The current controversy, in which the Tribe was not invited to, and, heretofore, did not, participate, threatens to *diminish* by more than *three* million acres the *jurisdictional territory* of the Tribe. . . .

*Id.* at ii (emphasis added).

It was in this light that this Court, fully informed, granted the petition for certiorari, notwithstanding the opposition of the Ute Indian Tribe.

The United States, consistent with all previous submissions, also viewed the issue in the same light. However, the United States agreed that certiorari should be granted in *Hagen* because plenary review was appropriate. The review, according to the United States, would resolve the conflict between the views expressed by the Utah

Supreme Court and the *Ute Indian Tribe* decision. The United States posed the question in the following manner:

In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation.

Br. for the United States as Amicus Curiae, at 5, *Hagen*, 510 U.S. 399 (citing Respondent's Br. App. at 289-639, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

The decision of the Utah Supreme Court in this case conflicts with the resolution of the same question by an en banc decision of the federal court of appeals . . .

*Id.* (citing *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1088-89 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986)).

On the merits, the Ute Indian Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly recognized, emphasized, and stressed the scope of the issue presented:

This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. . . . [A]n issue that will finally determine the scope of the jurisdiction. . . .

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, *Hagen*, 510 U.S. 399.

The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres . . . the Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect

of reducing the size of the Reservation, and correspondingly the *area* over which the Tribe may exercise jurisdiction, by approximately *three* million acres.

*Id.* at 4-5 (emphasis added).

Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation. More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a *tract-book* search to determine both civil and criminal jurisdiction.

*Id.* at 7-8 (emphasis added) (footnote omitted).

[T]ribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on *non-trust lands* of the Reservation. See *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Third, tribal members residing on *non-trust lands* of the Reservation would no longer be able to avail themselves of tribal court jurisdiction. . . . [T]ribal members *not* residing, working and locating their property on *trust lands* of the Reservation would be burdened. . . .

*Id.* at 8-9 (emphasis added).

As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on *trust* lands and those who do not. Those members who reside on *trust* lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government. However, those tribal members who now reside on *non-trust* lands of the Reservation . . . become persons subject to the jurisdiction of the State of Utah.

*Id.* at 9 n.5 (emphasis added).

[T]he boundaries of the Reservation would no longer be at issue. . . .

*Id.* at 10 n.7.

The Court denied the Motion to Intervene.

In June, 1993, the Ute Indian Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Indian Tribe described to this Court the issues in the same manner:

There Is No Statutory Language of *Termination*, *Abolishment* or *Cession* in the Act Opening the Uintah Valley Reservation to Settlement by Non-Indians.

Br. of *Amicus Curiae* Ute Indian Tribe at i, *Hagen*, 510 U.S. 399 (emphasis added).

[T]he Unallotted Lands Were Not *Disestablished*.

*Id.* at ii (emphasis added).

[T]he *boundaries* of the Uintah Valley Reservation are at issue in this action.

*Id.* at 1 (emphasis added).

[T]he 1905 Act did not *disestablish* the Reservation.

*Id.* at 2 (emphasis added).

[T]he 1905 Act opened the Reservation and that the Act did not *disestablish* the Reservation, the Utah Supreme Court reached a contrary result. . . .

[T]he court found, in diametric opposition to the federal courts that previously had considered the issue, that the Uintah Valley Reservation had been *disestablished*.

*Id.* at 6 (emphasis added) (footnote omitted).

This Court granted the petition for writ of *certiorari* to review the Utah Supreme Court's resolution of the reservation-boundary issue because it irreconcilably conflicts with the prior decisions of the federal courts on the same issue.

*Id.* at 7 (footnote omitted).

[T]he Court has acknowledged that, in a limited number of circumstances, Congress intended a particular surplus land Act to *disestablish* the opened area from the affected reservation. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Congressional intent determines when a particular surplus land Act *disestablished* unallotted lands. . . .

*Id.* at 9 (emphasis added).

While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply of *state law* for conduct on *non-trust lands*. . . .

*Id.* at 10 n.11 (first and last emphasis added).

[L]egislative history of the 1905 Act parallels that of the 1892 Act which this Court held did not effect a *disestablishment* of the Klamath River Reservation. . . . Here, as this Court pointed out in *Mattz*, "Congress was fully aware of the means by which *termination* could be effected." *Id.* at 504. But clear *termination* language was *not* employed in the 1905 Act.

*Id.* at 23 n.24 (last emphasis in original).

Moreover, *McLaughlin's* discussions with the Utes focused on opening the Reservation pursuant to the *manner* prescribed in the 1902 Act. See *id.* at 1. As discussed above, the Reservation was opened in the *manner* prescribed in the 1905 Act. Therefore, any discussions between *McLaughlin* and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

*Id.* at 25 n.25 (emphasis added).

After this Court granted the petition for *certiorari*, the United States also repeated the arguments made initially in this Court in *Ute Indian Tribe*. At this point, the issue was still described in the same terms:

QUESTION PRESENTED: Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation *altered the boundaries* of the Reservation. . . .

Br. for the United States as *Amicus Curiae* supp'g Pet'r at i, *Hagen*, 510 U.S. 399 (No. 92-6281) (emphasis added).

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country.

*Id.* at 1.

[T]he Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement *diminished* the Uintah Indian Reservation and that the town of Myton accordingly lies *outside the boundaries of the Reservation*.

*Id.* at 7 (emphasis added) (citing Respondents Br. App. at 28a-63a, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

Like several of this Court's *previous cases*, the present controversy turns on the *effect* of a surplus land Act opening an Indian reservation to settlement by non-Indians.

*Id.* (emphasis added).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two *recent cases* in which the Court has found that *reservation boundaries were altered* by Congress.

*Id.* at 15 (citing *DeCoteau*, 420 U.S. at 445) (emphasis added).

[T]here is no document in this case that establishes the "unmistakable *baseline purpose of disestablishment*" that was so important to the Court. . . .

*Id.* at 23 (emphasis added) (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 592).

[T]he Indians in this case steadfastly refused to consent to *any alteration* of the Reservation boundaries. . . .

*Id.* at 23 (emphasis added).

[T]he Utah Supreme Court *erred* in relying (Resp. App. at 37a) on Inspector McLaughlin's advice to the Indians that "there will be *no outside boundary line* to this reservation."

*Id.* at 23 n.31 (emphasis added).<sup>2</sup>

Although the Ute Indian Tribe did not participate in Oral Argument before this Court, the United States did. Nothing in the Transcript of Oral Argument supports the post-*Hagen* position of the United States:

QUESTION: . . . speaking of restoration to the public domain, if land had been restored, would the *reservation boundary be excluded*. . . .

Tr. of Oral Argument at 18, *Hagen*, 510 U.S. 399 (emphasis added).

MR. MANN: . . . the language would not have been sufficient to *alter the boundaries* of the reservation.

*Id.* (emphasis added).

(b) Language employed by the Petitioner in *Hagen*.

The preceding extended discussion of the views of the Ute Indian Tribe and the United States fairly reflects the issue as submitted and decided in the Utah Supreme Court and in this Court. In all respects, the views of the

<sup>2</sup> This Brief of the United States is reproduced in the Appendix to the Brief for Charles Mix County at the petition stage of these proceedings.

parties and other *amici* mirror this understanding. There is no need in this brief to further document that position, however, with one exception. That exception involves the arguments of Petitioner in *Hagen*. Petitioner's views are noteworthy in this regard because they were submitted by former attorneys of record for the Ute Indian Tribe involved in the federal district court, the court of appeals, and this Court in opposing certiorari in the *Ute Indian Tribe* litigation. As such, these arguments reflect a familiarity with all aspects of the disestablishment issue in *Ute Indian Tribe* and *Hagen*. This is the perspective from which Petitioners' submissions on the merits in *Hagen* should be viewed:

[*Hagen*] had lived for five to six years on the Ute Reservation on *nontrust land* in the vicinity of Myton, Utah.

Br. of Pet. at 4, *Hagen*, 510 U.S. 399 (emphasis added).

[T]he issue of Uintah Valley Reservation *disestablishment*. . . .

*Id.* at 5 (emphasis added).

The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation.

*Id.* at 16-17 (emphasis added).

If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust lands*.

*Id.* at 29 (emphasis added).

Boundaries Are Not *Abolished* When Indians and NonIndians Are Encouraged to Live Side by Side. . . . [I]t will be helpful to review briefly the Court's *five disestablishment cases*.

*Id.* at 32 (emphasis added).

[O]ne was found to have *diminished* the reservation in question. That *conclusion* was reached in *De-*

*Coteau*, 420 U.S. at 446, because the Court . . . the Indians and the United States both were satisfied that the mere retention of *allotments*, rather than the retention of the *reservation boundary*, would provide an adequate "fulcrum for tribal affairs."

*Id.* at 33 (emphasis added) (footnote omitted).

The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical *characteristics* found by the Court to have accomplished a reservation *extinguishment*.

*Id.* at 37 (emphasis added).

The State of Utah keeps trying, without success, to sell the federal courts on the hypothesis that the predecessor 1902 Act, simply because it included the phrase "restored to the public domain," established a baseline intent to *disestablish* which was carried forward in the 1905 Act which actually opened the Reservation.

Obviously, this comparison confirms that the Ute Indians, *unlike* the Rosebud Sioux (*Rosebud, supra*) and the Sisseton-Wahpeton Sioux (*DeCoteau, supra*) were unwilling to abandon and vacate the Uintah Valley Reservation. . . . The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary.

*Id.* at 43 n.24 (emphasis added).

[I]t is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian lands to the public domain in and of itself *extinguishes a reservation boundary*. . . .

*Id.* at 48 (emphasis added).

In the Reply Brief, the views of Petitioner reflect the same position:

Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reserva-

tion were *disestablished* . . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . .

*Id.* at 2 (emphasis added).

A review of the 1902-1905 Acts at issue here shows that unlike *Rosebud* and *DeCoteau*, the opening of Ute lands was made with no reference to an agreed cession of Reservation *boundaries*. Nor do the 1902-1905 Ute Acts describe the Reservation as "*vacated*," "*discontinued*" or "*abolished*"—language which Congress has used elsewhere to *terminate* a Reservation.

*Id.* (emphasis added).

This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by nonIndians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on . . . lands retained by the Ute Indian Tribe for its members.

*Id.* at 16-17 (emphasis added).

At oral argument, the same counsel for Petitioner on the merits briefs *supra*, (that represented the Ute Indian Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the issue in even more succinct terms:

MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . .

Tr. of Oral Argument at 3, *Hagen*, 510 U.S. 399 (emphasis added).

MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if

the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . .

*Id.* at 5 (emphasis added).

MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *distestablished* or not.

*Id.* at 9 (emphasis added).

COURT: [L]anguage of reverting to the public domain would be treated as diminishing the reservation boundary.

*Id.* at 11.

MR. SENECA: Not—not—

*Id.*

COURT: [A]t a loss to understand what that phrase could possibly have meant in that statute unless it meant the diminishment of the reservation.

*Id.*

COURT: And you're saying that allowing white settlers to come onto the reservations would be referred to as restoring the reservation to the public domain, permitting the entry by white settlers would be described in that fashion with those words?

*Id.* at 12.

MR. SENECA: Yes.

*Id.*

COURT: I cannot imagine that.

*Id.*

MR. SENECA: [T]he *DeCoteau* case, where there was a clear understanding between the Indians and the Government that that reservation *boundary* was to be vacated, to be *disestablished*.

*Id.* (emphasis added).

MR. SENECA: In this instance, there is no such agreements. In fact, the Ute Indians resisted the allotment of their reservation all the way. There

was never any agreement by the Ute Indian Tribes to be involved in *disestablishment*.

*Id.* at 13 (emphasis added).

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation *boundary* be excluded, in your view? Was that language clear enough under the *Seymour* case, and *DeCoteau*, and some of the others?

*Id.* at 18 (emphasis added).

Any argument that now maintains that this Court did not consider the issue and resolve it in this context should be squarely rejected.

**D. This Court's Opinion in *Hagen* Does Not Support the Post-*Hagen* Argument of the United States.**

This Court began its analysis in *Hagen v. Utah* with a general observation:

Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to *terminate* reservation status.

*Hagen*, 510 U.S. at 413 (second emphasis added).

And the Court further stated:

Likewise, in *Decoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status*, can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" 420 U. S., at 446 (emphasis added).

*Id.* at 413.

The Court later set forth the following quotation in the text of the *Hagen* Opinion in support of its conclusion, including the bracketing and special emphasis:

Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . "You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*" . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

*Id.* at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18, to May 23, 1903).

The United States now maintains that the result in *Hagen* does not support diminishment/disestablishment in any recognized sense. And the United States nevertheless advances this argument in spite of all of the above.

At bottom, the sole basis for the United States' support for this argument is a narrow focus on two sentences in the *Hagen* Opinion, taken out of context, and viewed without any historical perspective whatsoever:

In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished the reservation*.

*Hagen*, 510 U.S. at 414 (emphasis added).

While the post-*Hagen* argument stresses the lack of reservation status "with respect to *those lands*," (rather than the lack of reservation status of the *area* affected) and "diminished the reservation" (as opposed to a *dis-*

established or terminated the reservation description), it omits any reference to the "termination" description of *Ute Indian Tribe* in the very next sentence. This sentence in the *Hagen* Opinion undermines both points and with them, the entire foundation for the novel post-*Hagen* argument.

In context, *Hagen* states:

In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate a reservation*, *Ute Indian Tribe*, 773 F.2d, at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied, 498 U.S. 1012 (1990).

*Hagen*, 510 U.S. at 414 (emphasis added).

First, the Court prefaces the entire paragraph by expressly referencing "our precedents." *Id.* In context, the complete paragraph makes clear that the Court was not fashioning or allowing any result that would accommodate such a novel argument even if it had been advanced and, of course, it was not. This *Hagen* "terminate a reservation" description of the overall issue in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), squarely refutes any argument to the contrary. See also *DeCoteau*, 420 U.S. 425 ("terminated").

Subsequent to the decision of *Hagen*, the Ute Tribe attempted to submit an *amicus curiae* brief in support of the petition for rehearing in this Court. The Court did not allow the *amicus* brief to be filed. Counsel for Peti-

tioner in *Hagen* thereafter promptly resubmitted the same text under the caption of a Motion to Supplement Petition for Rehearing. It was in this form that the new post-*Hagen* theory of what was really at issue in *Hagen* first surfaced. This Court denied the petition without comment.

Apart from the apparent dilemma of attempting to present argument that counters traditional disestablishment considerations and addresses disestablishment precedent and issues in those terms, (as the United States did and continues to do to this day), while at the same time maintaining that disestablishment in the sense of those cases was *never* really an issue, the substance of the motion is noteworthy in only one other respect.

In the process of telling this Court that its decision in *Hagen* only excised the unallotted homestead land from the Uintah reservation, leaving the historic reservation boundary otherwise intact (according to the new post-*Hagen* theory), the submission makes one critical concession. This concession, in the Counties' view, is telling here insofar as practical considerations have any role in this process. According to the admission, if this new post-*Hagen* theory were really the holding of *Hagen*, "consistent law enforcement" and the "administration of civil laws" would be "virtually impossible" throughout the entire area. Br. of *Amicus Curiae* Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4, *Hagen*, 510 U.S. 399. We agree. Similarly, according to the submission, it would also be "virtually impossible to bring any continuity or organization to such regulatory activities as zoning, liquor regulation and taxation." *Id.* We also agree. In addition, the submission goes on to assert that:

The jurisdictional chaos is further increased because, within the townsites established under the 1905 Presidential Proclamation, the lots that had not been purchased were restored to the Tribe by the 1945 Restoration Order. Thus, the State may have juris-

diction over one lot, but the Tribe and United States may have jurisdiction over the lot next door. Conceivably, a store within a townsite or Roosevelt City could be located on two lots—one a former homestead and one a former allotment or parcel restored to the Tribe. Under such circumstances, the majority's decision could result in the *absurd situation* of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased.

*Id.* at 4-5 (emphasis added) (footnote omitted).

Importantly, the Counties further agree with the hypothetical conclusion in this argument. As stated:

If all of the non-trust lands had been disestablished from the Reservation, as Utah implied, jurisdictional determinations would require a tract book search to discover the *trust/non-trust* status of the land [*DeCoteau* and *Rosebud*]. However, given the various categories of land existing on the Reservation, under the majority's decision [new post-*Hagen* theory] jurisdictional determinations will require a tract-by-tract *title search* in order to ascertain whether a particular site is homesteaded land, former allotment land now in fee status, land restored to tribal ownership under the 1945 Restoration Order, land partitioned under the Ute Partition Act, present allotted land or tribal trust land.

*Id.* at 3-4 (first emphasis added).

In this instance, the submission is absolutely correct. To the extent that *Hagen* represents disestablishment/diminishment in the traditional sense, only trust lands are Indian country under 18 U.S.C. § 1151(c). In this situation, trust tract searches are occasionally necessary. Of course, this result was approved in *DeCoteau* and *Rosebud* for the reasons there stated. *DeCoteau*, 420 U.S. at 427 n.2, 446-447, 429 n.3. *See also Yazzie*, 909 F.2d at 1421-22. However, to the extent that anyone accepts the new post-*Hagen* theory, a complete title search would be

necessary for each and every arrest on fee lands throughout the entire area to determine if the ultimate source of title was actually homesteaded land. Because the vast majority of all crimes are committed on these fee lands (population centers, highways, and so forth) "jurisdictional chaos" would truly result. The Tenth Circuit should have squarely rejected the new post-*Hagen* argument.<sup>3</sup>

#### E. The United States has Abandoned the Classic "Checkerboard Jurisdiction" Argument.

Other arguments of the United States are also plainly inconsistent with the novel post-*Hagen* position of historic reservation boundaries surrounding all but homesteaded lands. From the beginning, the United States repeatedly used the classical "impractical pattern of checkerboard jurisdiction" argument in resisting reservation "disestablishment."

[T]o find disestablishment in this case would result in an "impractical pattern of checkerboard jurisdiction," *Seymour, supra*, at 358. . . .

Br. of the United States at 14-15, *Ute Indian Tribe*, 773 F.2d 1087 (1985) (*en banc*) (footnote omitted).

<sup>3</sup> Although not an issue here, to the extent that the Tenth Circuit's latest decision summarily precludes any reconsideration regarding the status of the Uintah National Forest or the original Uncompahgre reservation (as mistakenly set forth in *Ute Indian Tribe*, 773 F.2d at 1089-1093) because of "finality" principles, it is in further conflict with *Hagen*.

Considering the very significant observation of this Court in *Hagen* that the Tenth Circuit's *en banc* opinion altered *decades* of "justifiable expectations," *Hagen*, 510 U.S. at 421, the balance of the Tenth Circuit's latest opinion regarding "finality" does not really ring true. In addition, the views of the Tenth Circuit in this respect do not reflect any consideration of contrary views noted in decades of previous federal and state opinions noted by this Court in *Hagen*. In this respect, the Tenth Circuit, like the Eighth Circuit in the instant case, would benefit from additional guidance from this Court.

Of course, this "checkerboard" argument makes sense only in the context of trust lands not within reservation limits as noted in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) diminishment/disestablishment situations. By no stretch of the imagination could it possibly apply to the situation the United States now maintains was the intended result of *Hagen*.<sup>4</sup>

### CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the post-*Hagen* argument of the United States should be rejected in the process.

Respectfully submitted,

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Dated: August 7, 1997

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<sup>4</sup> *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-1422 (10th Cir. 1990) has since clarified and correctly stated the prevailing law on checkerboard jurisdiction in the Tenth Circuit. See also *DeCoteau*, 420 U.S. at 427 n.2, 429 n.3, 446-447.

## **APPENDICES**

## APPENDIX A

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra*, ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

\* \* \* \*

A conclusion that these sections disestablish the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty, or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the new boundaries is the explicit meaning of *Celestine, supra*, and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,<sup>6</sup> including the Act of March 3, 1891, opening Lake Traverse and six other reservations. *Mattz v. Arnett, supra*, 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra*, 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,<sup>7</sup> the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.<sup>8</sup>

\* \* \* \*

## APPENDIX B

\* \* \* In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" *a described tract*.<sup>3</sup> Another agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation" all their claim, title, and interest in *a described tract*.<sup>4</sup> Another agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion" of a named reservation *as specifically described*.<sup>5</sup> Another agreed to sell to the United States "all that portion" of the reservation *described by metes and bounds*.<sup>6</sup> Congress made an unmistakable change when it came to the lands ceded in the instant case. (Emphasis added).

## APPENDIX C

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is *no specific area ceded*, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes.

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective. (Emphasis added).

**APPENDIX D**

**HOUSE OF REPRESENTATIVES.**

**59TH CONGRESS, 2d Session.**

**REPORT No. 7613.**

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**SALE AND DISPOSITION OF CERTAIN LANDS IN  
ROSEBUD INDIAN RESERVATION, S. DAK.**

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**FEBRUARY 14, 1907.**—Committed to the Committee  
of the hWole House on the state of the Union  
and ordered to be printed.

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**Mr. BURKE**, of South Dakota, from the Committee on  
Indian Affairs, submitted the following

**REPORT.**

[To accompany H. R. 24987.]